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No. 12-10

In the Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,
PETITIONERS

v.

ALLIANCE FOR OPEN SOCIETY
INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. 7631(f), which requires organizations to have a policy explicitly opposing prostitution and sex trafficking in order to receive federal funding to provide HIV and AIDS programs overseas, violates the First Amendment.

PARTIES TO THE PROCEEDING

Petitioners are the United States Agency for International Development; Rajiv Shah, Administrator of the United States Agency for International Development; the United States Department of Health and Human Services; Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; the United States Centers for Disease Control and Prevention; and Thomas R. Frieden, the Director of the United States Centers for Disease Control and Prevention.

Respondents are Alliance for Open Society International, Inc., Pathfinder International, Global Health Council, and InterAction.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional, statutory, and regulatory provisions involved 2
Statement 2
Summary of argument 11
Argument:
The Leadership Act's funding condition is a valid exercise of Congress's authority under the Spending Clause 15
A. Congress has wide latitude to attach conditions to the receipt of federal funds in order to further broad policy objectives of federal programs 16
B. Section 7631(f) ensures that the Leadership Act's policy opposing prostitution and sex trafficking is effectively implemented by funding recipients 19
1. The policy condition is an appropriate step to ensure that the Act's policy opposing prostitution and sex trafficking is not distorted by recipients 19
2. Congress determined that the policy condition is an important part of the Leadership Act's comprehensive strategy 25
C. Section 7631(f) is not unconstitutional on the rationale that it compels recipients to speak with respect to prostitution and sex trafficking 33
D. Section 7631(f) does not aim at the suppression of disfavored viewpoints 36
E. Section 7631(f) is not a direct speech regulation but a condition on the receipt of federal funds 40
F. The agencies' affiliation guidelines obviate any constitutional difficulty 44

Table of Contents—Continued: Page

G. Respondents' vagueness challenge is not presented and lacks merit in any event 49
Conclusion 52

TABLE OF AUTHORITIES

Cases:

American Commc'ns Ass'n v. *Douds*, 339 U.S. 382 (1950) 36
Arkansas Writers' Project, Inc. v. *Ragland*, 481 U.S. 221 (1987) 37
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 49
DKT Int'l, Inc. v. *United States Agency for Int'l Dev.*, 477 F.3d 758 (D.C. Cir. 2007) ..... *passim*
DKT Mem'l Fund Ltd. v. *Agency for Int'l Dev.*, 887 F.2d 275 (D.C. Cir. 1989) 23
FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502 (2009) 49
FCC v. *League of Women Voters*, 468 U.S. 364 (1984) 38, 46
Fullilove v. *Klutznick*, 448 U.S. 448 (1980) 17
Grove City Coll. v. *Bell*, 465 U.S. 555 (1984) 17
Guardians Ass'n v. *Civil Serv. Comm'n*, 463 U.S. 582 (1983) 18, 28
Holder v. *Humanitarian Law Project*, 130 S. Ct. 2705 (2010) 27
Johanns v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) 41
Legal Aid Soc'y v. *Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir.), cert. denied, 525 U.S. 1015 (1998) 46
Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533 (2001) 22, 24, 38
McGinnis v. *Royster*, 410 U.S. 263 (1973) 29

Cases—Continued: Page

National Endowment for the Arts v. *Finley*, 524 U.S. 569 (1998) ..... *passim*
National Treasury Emps. Union v. *Von Raab*, 489 U.S. 656 (1989) 20
Pennhurst State Sch. & Hosp. v. *Halderman*, 451 U.S. 1 (1981) 18
Perry v. *Sindermann*, 408 U.S. 593 (1972) 39
Planned Parenthood of Mid-Mo. & E. Kan., Inc. v. *Dempsey*, 167 F.3d 458 (8th Cir. 1999) 46
Regan v. *Taxation with Representation*, 461 U.S. 540 (1983) 30, 34, 45
Riley v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) 12, 33
Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) ..... *passim*
Ruggiero v. *FCC*, 317 F.3d 239 (D.C. Cir.), cert. denied, 540 U.S. 813 (2003) 30
Rumsfeld v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) 18, 41
Rust v. *Sullivan*, 500 U.S. 173 (1991) ..... *passim*
Simon & Schuster, Inc. v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) 37, 43
Speiser v. *Randall*, 357 U.S. 513 (1958) 8, 19, 36, 39
South Dakota v. *Dole*, 483 U.S. 203 (1987) 17
United States v. *American Library Ass'n, Inc.*, 539 U.S. 194 (2003) 17
Velazquez v. *Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999), cert. denied in relevant part, 532 U.S. 903 (2001) 45, 48
Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) 29

Cases—Continued: Page

West Va. State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 35, 41
Wooley v. *Maynard*, 430 U.S. 705 (1977) 35

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 1 (Spending Clause) 16
Amend. I ..... *passim*
Trafficking Victims Protection Act of 2000, 22 U.S.C. 7101 *et seq.* 5
22 U.S.C. 7101(a) 5
22 U.S.C. 7101(b)(1)-(3) 5
22 U.S.C. 7101(b)(8) 5
22 U.S.C. 7110(g)(1)-(2) 6
United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C. 7601 *et seq.* 2, 15
22 U.S.C. 7601(1) 2
22 U.S.C. 7601(2) 2
22 U.S.C. 7601(3)(A) 4
22 U.S.C. 7601(3)(B) 3
22 U.S.C. 7601(3)(C) 4
22 U.S.C. 7601(18) 21
22 U.S.C. 7601(19) 21
22 U.S.C. 7601(20) 4
22 U.S.C. 7601(20)(C) 5
22 U.S.C. 7601(21) 21
22 U.S.C. 7601(22) 21
22 U.S.C. 7601(23) 5, 19, 26, 30, 32
22 U.S.C. 7603 (Supp. V 2011) 3
22 U.S.C. 7611(a) (Supp. V 2011) 3, 21

Statutes and regulations—Continued: Page

22 U.S.C. 7611(a)(4) (Supp. V 2011) 3
22 U.S.C. 7611(a)(5) (Supp. V 2011)) 3
22 U.S.C. 7611(a)(7) (Supp. V 2011) 3
22 U.S.C. 7611(a)(9) (Supp. V 2011) 3
22 U.S.C. 7611(a)(10) (Supp. V 2011) 3
22 U.S.C. 7611(a)(12) (Supp. V 2011) 5, 20, 26
22 U.S.C. 7611(a)(12)(A) (Supp. V 2011) 4
22 U.S.C. 7611(a)(12)(B) (Supp. V 2011) 4
22 U.S.C. 7611(a)(12)(E) (Supp. V 2011) 4
22 U.S.C. 7611(a)(12)(F) (Supp. V 2011) 4, 26
22 U.S.C. 7611(a)(12)(H) (Supp. V 2011) 4, 26
22 U.S.C. 7611(a)(12)(J) (Supp. V 2011) 4, 26
22 U.S.C. 7611(a)(25) (Supp. V 2011) 3
22 U.S.C. 7621 21
22 U.S.C. 7631(e) 6, 21, 26, 41, 52
22 U.S.C. 7631(f) ..... *passim*
22 U.S.C. 7671 (2006 & Supp. V 2011) 6
22 U.S.C. 7671(a) 3
22 U.S.C. 7671(a) (Supp. V 2011) 3
12 U.S.C. 1831r-1(c) 49
20 U.S.C. 1232h(c)(1) 49
22 U.S.C. 2151b-2(b) (Supp. V 2011) 26
22 U.S.C. 2151b-2(c) (Supp. V 2011) 6
22 U.S.C. 2151b-2(c)(1) (Supp. V 2011) 25
22 U.S.C. 2151b-2(d)(1)(A) (Supp. V 2011) 4, 5, 26
22 U.S.C. 2151b-2(d)(3)(A) 26
22 U.S.C. 2222(*l*) (Supp. V 2011) 31
42 U.S.C. 5304(*l*)(1) 49
42 U.S.C. 5304(*l*)(2) 49

Regulations—Continued: Page

45 C.F.R.:
Section 89.1 7
Section 89.1(b) 44
Section 89.3 ..... 8, 44, 50, 51
Section 89.3(b) 8, 45

Miscellaneous:

75 Fed. Reg. 18,762 (Apr. 13, 2010) 51
Remarks on Signing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. Papers 541 (May 27, 2003) 2
Trafficking in Women & Children in East Asia & Beyond: A Review of U.S. Policy, Hearing Before the Subcomm. on East Asian & Pacific Affairs of the Senate Comm. on Foreign Relations, 108th Cong., 1st Sess. (2003) 5

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-96a) is reported at 651 F.3d 218. The order of the court of appeals denying rehearing (Pet. App. 97a-111a) is reported at 678 F.3d 127. The relevant orders of the district court (Pet. App. 112a-219a, 220a-252a) are reported at 430 F. Supp. 2d 222 and 570 F. Supp. 2d 533.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2011. A petition for rehearing was denied on February 2, 2012 (Pet. App. 97a-98a). On April 20, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including July 2, 2012, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech." Relevant statutory and regulatory provisions are reproduced in the appendix to the petition. Pet. App. 253a-340a.[1]

STATEMENT

1. a. This case presents a constitutional challenge to a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act or Act), 22 U.S.C. 7601 *et seq.* That Act responded to Congress's finding that the global spread of HIV/AIDS had infected more than 65 million people worldwide, killing 25 million and leaving more than 14 million orphaned children. See 22 U.S.C. 7601(2). Congress found that the spread of HIV/AIDS had assumed "pandemic proportions, * * * leaving an unprecedented path of death and devastation." 22 U.S.C. 7601(1). As of 2003, HIV/AIDS was the fourth-highest cause of death across the globe, and the President regarded addressing it as "one of the most urgent needs of the modern world." *Remarks on Signing the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003*, Pub. Papers 541, 542 (May 27, 2003).

The Leadership Act is the primary component of the United States' effort to fight HIV/AIDS abroad. Under

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[1] The last document in Appendix G to the petition is partially misnumbered. The final 24 pages should be numbered as 317a to 340a (rather than as 313a to 336a). Those pages are referred to herein as if they were correctly numbered.

that Act, Congress has authorized the appropriation of billions of dollars for the President to establish "a comprehensive, integrated, [five]-year strategy to expand and improve efforts to combat global HIV/AIDS." 22 U.S.C. 7611(a) (Supp. V 2011).[2] That comprehensive strategy must be designed to attack HIV/AIDS in multiple ways. Among other things, the strategy must include plans for providing care to those infected with HIV/AIDS; preventing further transmission of HIV infections, particularly among "families with children (including the prevention of mother-to-child transmission), women, young people, orphans, and vulnerable children"; expanding efforts with other public and private entities to improve HIV/AIDS prevention and treatment programs; and accelerating research on prevention methods. 22 U.S.C. 7611(a)(4), (5), (7), (9), (10) and (25) (Supp. V 2011); see 22 U.S.C. 7603 (Supp. V 2011) (describing Congress's goals in the Leadership Act).

b. As part of the Act's comprehensive approach to fighting HIV/AIDS, Congress paid close attention to the underlying social conditions that foster its spread. For instance, Congress found that "[w]omen are four times more vulnerable to infection than are men and are becoming infected at increasingly high rates, in part because many societies do not provide poor women and young girls with the social, legal, and cultural protections against high risk activities that expose them to HIV/AIDS." 22 U.S.C. 7601(3)(B). Congress noted that "[w]omen and children who are refugees or are internal-

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[2] Congress authorized $15 billion for the effort to combat HIV/AIDS, malaria, and tuberculosis for the period from 2004 to 2008, see 22 U.S.C. 7671(a) (2006), and it has since authorized an additional $48 billion for the period from 2008 to 2013, see 22 U.S.C. 7671(a) (Supp. V 2011).

ly displaced persons are especially vulnerable to sexual exploitation and violence, thereby increasing the possibility of HIV infection." 22 U.S.C. 7601(3)(C); see 22 U.S.C. 7601(3)(A) ("At the end of 2002, * * * more than 3,200,000 [of the individuals infected with HIV/AIDS worldwide] were children under the age of 15 and more than 19,200,000 were women.").

To prevent the transmission of HIV/AIDS among those high-risk groups, Congress addressed the conditions and behaviors it believed were responsible for placing them at risk. See 22 U.S.C. 2151b-2(d)(1)(A) (Supp. V 2011) (directing that HIV/AIDS funding be used to "help[] individuals avoid behaviors that place them at risk of HIV infection"). Specifically, the Leadership Act "make[s] the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts," including by promoting abstinence and monogamy, encouraging the proper use of condoms, and supporting drug prevention and treatment programs. 22 U.S.C. 7611(a)(12)(A), (B) and (E) (Supp. V 2011). As especially relevant here, the Act requires "educating men and boys about the risks of procuring sex commercially and about the need to end violent behavior toward women and girls"; "promot[ing] alternative livelihoods, safety, and social reintegration strategies for commercial sex workers"; and "working to eliminate rape, gender-based violence, sexual assault, and the sexual exploitation of women and children." 22 U.S.C. 7611(a)(12)(F), (H) and (J) (Supp. V 2011).[3]

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[3] In prioritizing the reduction of behavioral risks for HIV/AIDS, Congress invoked the success of the HIV/AIDS programs implemented by Uganda between 1991 and 2000. See 22 U.S.C. 7601(20). Uganda had developed a balanced approach to HIV/AIDS prevention, urging citizens to abstain from premarital sex, to be faithful to

As part of its emphasis on addressing behaviors that create a particular risk of HIV infection, Congress made a considered decision to pursue the reduction of prostitution and sex trafficking, particularly in developing countries where most of the federally funded programs at issue are carried out. In enacting the Leadership Act, Congress found that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). In Cambodia, for example, "as many as 40 percent of prostitutes are infected with HIV and the country has the highest rate of increase of HIV infection in all of Southeast Asia." *Ibid.* Among female prostitutes in certain areas of Thailand and India, the rates of HIV/AIDS infection were even higher. See *Trafficking in Women & Children in East Asia & Beyond: A Review of U.S. Policy, Hearing Before the Subcomm. on East Asian & Pacific Affairs of the Senate Comm. on Foreign Relations*, 108th Cong., 1st Sess. 18 (2003) (statement of Sen. Brownback, Subcommittee Chairman). Moreover, prostitution fuels the demand for international sex trafficking of women and children. See *id.* at 18-19.[4]

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sexual partners, and to use condoms. See 22 U.S.C. 7601(20)(C). Congress directed that similar messages be promoted to combat HIV/AIDS worldwide. See 22 U.S.C. 2151b-2(d)(1)(A), 7611(a)(12) (Supp. V 2011).

[4] In enacting the Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. 7101 *et seq.*, Congress sought to eliminate the global criminal trade in persons, in which 700,000 individuals are trafficked each year into forced prostitution and other forms of modern-day slavery. See 22 U.S.C. 7101(a), (b)(1)-(3) and (8). Like the Leadership Act, the TVPA (as amended in 2003) prohibits the use of federal funding "to promote, support, or advocate the legalization or practice of prostitution," and further provides that federal funding to

2. Pursuant to the Leadership Act, the United States has provided billions of dollars to nongovernmental organizations so that they can assist in the fight against the HIV/AIDS epidemic overseas. See 22 U.S.C. 2151b-2(c) (Supp. V 2011); 22 U.S.C. 7671 (2006 & Supp. V 2011). In order to ensure that those funds are spent in accordance with the Act's objectives, Congress has placed two limitations on the use of the funds. First, Section 7631(e) of the Act provides that no funds made available under the Act "may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. 7631(e). Second, Section 7631(f)—the provision at issue in this case—provides that no funds made available under the Act "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f). That statutory restriction does not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; or to any United Nations agency. See *ibid.*

The Department of Health and Human Services (HHS) and the United States Agency for International Development (USAID) are the federal agencies primarily responsible for overseeing programs and services under the Leadership Act. They have implemented Section 7631(f)'s funding eligibility condition in similar ways. HHS has promulgated a regulation that, in its current form, requires the recipient of any grant, cooperative agreement, or other funding arrangement to

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rescue and assist the victims of severe forms of trafficking will be provided only to organizations that state that they do not "promote, support, or advocate the legalization or practice of prostitution." 22 U.S.C. 7110(g)(1)-(2).

agree in the award document that it is "opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. 89.1. Likewise, USAID has issued an Acquisition and Assistance Policy Directive that similarly requires the recipient of any HIV/AIDS-related contract, grant, or cooperative agreement under the Leadership Act to agree in the award document that it is opposed to prostitution and sex trafficking. See Pet. App. 299a-340a.

3. Respondents Alliance for Open Society International, Inc. (AOSI) and Pathfinder International (Pathfinder) are nongovernmental organizations that receive funding for overseas HIV/AIDS prevention programs under the Leadership Act. In 2005, they brought suit against HHS, USAID, and other federal agencies and officials, alleging that Section 7631(f) violates the First Amendment by conditioning their receipt of Leadership Act funds on the affirmative adoption of a policy opposing prostitution. Respondents did not challenge the portion of Section 7631(f) that conditions their receipt of funding on having a policy opposing sex trafficking. Respondents also did not challenge the complementary condition in Section 7631(e) barring the use of funds under the Act "to promote or advocate the legalization or practice of prostitution or sex trafficking."

In 2006, the district court granted respondents AOSI and Pathfinder preliminary injunctive relief. Pet. App. 112a-219a. Applying heightened scrutiny, *id.* at 164a, 196a, the court held that Section 7631(f) is not narrowly tailored to Congress's interest in eradicating prostitution as part of its strategy to combat HIV/AIDS, imposes a viewpoint-based restriction on respondents' use of funds, and impermissibly compels private speech. *Id.* at

198a-214a; see *id.* at 214a ("Because the provision as construed by [petitioners] cannot survive heightened scrutiny, and also impermissibly discriminates based on viewpoint and compels speech, it violates the First Amendment.").

While the government's appeal of that decision was pending, HHS and USAID developed guidelines that allow recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). Those guidelines permit an organization to remain eligible for funding and yet be affiliated with a group that "engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," so long as the organization that receives funding has "objective integrity and independence from [the] affiliated organization." 45 C.F.R. 89.3; see Pet. App. 297a, 309a. Whether a recipient is independent from affiliated organizations depends on the totality of the circumstances, including such factors as whether the groups are legally distinct and maintain separate personnel, records, facilities, and forms of identification. See 45 C.F.R. 89.3(b); Pet. App. 298a, 309a-310a.

In light of the new guidelines, the court of appeals remanded for the district court to determine whether preliminary injunctive relief continued to be appropriate. Pet. App. 224a. On remand, the district court held that the newly issued guidelines did not affect its previous decision. *Id.* at 241a-250a. The district court also extended injunctive relief to two new plaintiffs named in an amended complaint, respondents Global Health Council (GHC) and InterAction, which are associations of nongovernmental organizations that collectively include most of the groups based in the United States that

receive federal funding under the Leadership Act. *Id.* at 227a, 251a-252a. The government again appealed. While that second appeal was pending, HHS and USAID promulgated further guidance that allows funding recipients additional flexibility in partnering with affiliates not subject to Section 7631(f). *Id.* at 10a-11a.

4. a. A divided panel of the court of appeals affirmed. Pet. App. 1a-96a. The court held that Section 7631(f) "likely violates the First Amendment by impermissibly compelling [respondents] to espouse the government's viewpoint on prostitution." *Id.* at 17a. According to the court, Section 7631(f) "falls well beyond * * * permissible funding conditions," because "[it] does not merely restrict recipients from engaging in certain expression * * * but pushes considerably further and mandates that recipients affirmatively *say* something." *Id.* at 25a. The court also observed that Section 7631(f) is impermissibly "viewpoint-based, because it requires recipients to take the government's side on a particular issue." *Id.* at 27a. The court recognized that the government may require "affirmative, viewpoint-specific speech as a condition of participating in a federal program," but only where "the government's program *is*, in effect, its message." *Id.* at 32a. Here, the court concluded, the purpose of the Leadership Act is to fight HIV/AIDS, and in its view advocacy against prostitution is not central to that mission. *Id.* at 32a-34a. The court rejected the government's argument that, "because any entity unwilling to state its opposition to prostitution can form an affiliate that does so," "any compelled-speech type problems" are alleviated by the HHS and USAID guidelines. *Id.* at 35a-36a.

b. Judge Straub dissented on the ground that Section 7631(f) "neither imposes a coercive penalty on protected

First Amendment rights nor discriminates in a way aimed at the suppression of any ideas." Pet. App. 37a. A funding condition "cabined to the federal subsidy program to which it is attached" has no "coercive force" even if it "limit[s] or affect[s] speech," Judge Straub reasoned, because potential recipients "can simply choose not to accept the funds." *Id.* at 55a-56a. After surveying this Court's decisions addressing conditions on government subsidies, Judge Straub reasoned that those decisions allow the government to "insist[] that public funds be spent for the purposes for which they were authorized." *Id.* at 73a (brackets in original) (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 196 (1991)). In Judge Straub's view, Section 7631(f) "does precisely that" because Congress "only authorized federal funds for organizations that shared its desire to affirmatively reduce HIV/AIDS behavioral risks, including its policy of eradicating prostitution." *Id.* at 74a. Finally, Judge Straub observed, the agencies' guidelines leave funding recipients able "to remain silent or to espouse a pro-prostitution message with non-Leadership Act funds." *Id.* at 77a.

5. The court of appeals denied rehearing en banc, over the dissent of three judges and with the concurrence of one other judge. Pet. App. 97a-111a. Judge Cabranes (joined by Judges Raggi and Livingston) concluded that en banc review was appropriate because "[t]he question presented is indisputably one of exceptional importance," *id.* at 98a; "the panel decision 'splits' from the District of Columbia Circuit, which rejected a nearly identical challenge," *id.* at 103a (citing *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758 (D.C. Cir. 2007)); and "[t]he decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirma-

tive' and 'negative' speech restrictions," *id.* at 99a. According to Judge Cabranes, "it is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention." *Id.* at 103a. Judge Pooler issued an opinion concurring in the denial of rehearing en banc. *Id.* at 106a-111a.

SUMMARY OF ARGUMENT

A. The condition at issue in Section 7631(f) of the Leadership Act—*i.e.*, that recipients of federal funds under the Act have a policy opposing prostitution and sex trafficking—is an exercise of Congress's spending power. When exercising that power, Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. Private entities that do not wish to comply with those conditions may avoid them simply by declining federal funds. See, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991). The court of appeals nevertheless concluded that the funding condition in this case is impermissible, because the First Amendment independently bars the government from requiring recipients of Leadership Act funds to adopt its position on prostitution and sex trafficking. That conclusion was fundamentally mistaken. Respondents have been given a voluntary choice: whether to assist in carrying out a comprehensive governmental HIV/AIDS strategy that, among other things, aims to reduce behaviors like prostitution and sex trafficking that facilitate the disease's spread. Offering private entities that type of choice does not violate the First Amendment.

B. This Court has recognized in *Rust* and other cases that the government may enlist the assistance of private entities or organizations to convey its chosen message. When it does so, the government may take legitimate

steps to ensure that its message is effectively communicated, and not undermined, by the recipient. Here, Congress made plain in the Act that a comprehensive strategy to address HIV/AIDS should attempt to reduce its underlying causes, including prostitution and sex trafficking. Congress also decided that it would make little sense for the government to direct billions of dollars toward that end, and yet to engage as partners in that effort organizations that are neutral toward or that even affirmatively disagree with the government's decision to oppose those practices. See *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 762-763 (D.C. Cir. 2007). Respondents and the court of appeals have attempted to dismiss Section 7631(f)'s policy condition as inconsequential, but that misconceives both the Act and the appropriate judicial role. It is for Congress to decide when a condition on the receipt of federal funds is integral to a funding program, and it has done so here. See *Rust*, 500 U.S. at 193.

C. The court of appeals reasoned that the Act's policy requirement is impermissible because it affirmatively compels speech by the recipients of the Act's funds. This Court has never held, however, that it matters whether conditions on the receipt of federal funding compel speech or silence. To the contrary, the Court has held that the distinction is without constitutional significance in the context of the direct regulation of speech. See *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). There is no reason, then, that the distinction should be dispositive in the context of funding conditions, where prospective recipients are not in any sense compelled to speak because they may avoid the conditions altogether simply by declining to accept the federal funds at issue. Accordingly,

as the dissenters below explained, the reasoning of this Court's decisions on funding conditions lends no support to the court of appeals' novel affirmative-negative dichotomy.

D. To be sure, Congress's authority under the Spending Clause is not without First Amendment limits. This Court has indicated that a funding condition is subject to heightened scrutiny when it is aimed at suppressing dangerous ideas or disfavored viewpoints. But respondents have not argued, and the court of appeals did not conclude, that Section 7631(f)'s policy requirement is aimed at suppressing expression by private HIV/AIDS relief organizations. As a result, this is not a case in which it is difficult to determine whether a particular condition is designed permissibly to enlist private entities in communicating a governmental message or instead impermissibly to coerce private entities into refraining from expression on a disfavored topic.

E. Respondents treat Section 7631(f) as though it were a direct regulation of speech rather than a condition on the receipt of federal funds. They rely on cases analyzing direct regulations that compel speech or discriminate on the basis of viewpoint, without any acknowledgment that the government may allocate funding according to criteria that would be impermissible were direct regulation of speech at stake. See, *e.g.*, *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998). That distinction is critical: providing funds to organizations that will faithfully promote Congress's program and message is a far cry from denying citizens access to generally available public benefits. Respondents simply misconstrue First Amendment doctrine by claiming that they have been compelled to do anything: they must have a particular policy only be-

cause they chose to accept federal funds, not as a result of any legal mandate.

F. The agencies' affiliation guidelines obviate any conceivable constitutional difficulty. Those guidelines allow recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). This Court has repeatedly recognized the value of that type of affiliate structure. It is no answer to say (as respondents do) that the guidelines here are different because they require separate entities rather than separate programs. Either way, respondents may cabin the effects of Section 7631(f) to the scope of the federally funded programs at issue. Nor is it any answer to say (as the court of appeals did) that even if Section 7631(f) does not infringe respondents' speech rights, it infringes their *affiliates'* speech rights. By allowing respondents to form special-purpose affiliates, the agencies' guidelines confine any burden that might otherwise exist on the ability to communicate contrary views on prostitution and sex trafficking.

G. Finally, respondents argue that the policy condition is unconstitutionally vague. That argument is neither properly presented nor sound. The lower courts did not address it, and respondents may pursue it on remand. Moreover, respondents' vagueness challenge is not even to the statute—which is what the lower courts enjoined—but to the agencies' guidelines. Their vagueness claim thus cannot supply a basis for the judgment under review. In any event, the claim lacks merit: respondents cannot show that the guidelines are unclear, let alone so unclear that this Court should sustain respondents' facial, preenforcement challenge to them.

ARGUMENT

THE LEADERSHIP ACT'S FUNDING CONDITION IS A VALID EXERCISE OF CONGRESS'S AUTHORITY UNDER THE SPENDING CLAUSE

The Leadership Act, 22 U.S.C. 7601 *et seq.*, authorizes billions of dollars in federal aid to combat the worldwide HIV/AIDS epidemic. The Act calls for a comprehensive strategy that encompasses the provision of care to infected persons as well as the prevention of further transmission. Accordingly, Congress authorized agencies to provide funds to private HIV/AIDS relief organizations for foreign programs in a manner that seeks not only to treat the disease itself, but also to reduce the practices that foster its spread. As part of that strategy, the Act requires funding recipients to "have a policy explicitly opposing prostitution and sex trafficking." 22 U.S.C. 7631(f). It does so to ensure that its partners in the fight against HIV/AIDS further Congress's chosen program and comport with Congress's determination that participating in the sex trade or sex trafficking carries serious risks for women, men, and children across the globe. The court of appeals erred in invalidating that condition on the acceptance of federal funds, and in thereby undermining the government's ability to implement the comprehensive approach chosen by Congress.

Congress has broad authority under the Spending Clause to attach conditions to the receipt of federal funds in order to further its policy objectives. It has exercised that authority here to ensure that recipients, in performing work under the Leadership Act program, effectively adhere to the government's own policy under the Act of opposing prostitution and sex trafficking in order to reduce the spread of HIV/AIDS. Respondents

have not argued that the policy requirement is designed to suppress private speech in favor of prostitution and sex trafficking, and indeed respondents do not contend that they want to promote those practices. Respondents nonetheless challenge Section 7631(f)'s funding condition on the ground that it impermissibly compels speech. That argument ignores the critical distinction in this Court's cases between funding conditions and direct regulations of speech. Respondents face a choice whether to accept federal funding, but they do not face any form of legal compulsion. In any event, the agencies' affiliation guidelines cure any conceivable constitutional difficulty.

A. Congress Has Wide Latitude To Attach Conditions To The Receipt Of Federal Funds In Order To Further Broad Policy Objectives Of Federal Programs

1. The condition on the receipt of federal funds at issue in the Leadership Act—*i.e.*, that recipients have a policy opposing prostitution and sex trafficking—is not an exercise of Congress's regulatory authority over private conduct. It is instead an exercise of Congress's authority under the Spending Clause to "provide for the * * * general Welfare of the United States." U.S. Const. Art. I, § 8, Cl. 1. Congress has done so by specifying the purposes for which federal assistance to private organizations implementing federal programs may be used and the manner in which the programs' objectives will be pursued. As such, the Leadership Act's funding condition attaches only when a private organization voluntarily chooses to participate in the government's program by applying for and accepting federal assistance for the treatment and prevention of HIV/AIDS. Because Section 7631(f) is a condition on the receipt of federal assistance rather than a regulato-

ry restriction, this Court's Spending Clause cases provide the appropriate framework for assessing its constitutionality. See *United States* v. *American Library Ass'n, Inc.*, 539 U.S. 194, 203 n.2 (2003) (plurality opinion).

Under those cases, Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further broad policy objectives. See *American Library Ass'n*, 539 U.S. at 203 (plurality opinion); *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987); *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.). The constitutional limitations on Congress's exercise of the spending power "are less exacting than those on its authority to regulate directly." *Dole*, 483 U.S. at 209; see *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587-588 (1998) ("[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake."). Thus, "Congress may attach conditions on the receipt of federal funds" to accomplish particular objectives, even if Congress would be constitutionally barred from imposing the same conditions through direct government regulation. *Dole*, 483 U.S. at 206–207.

When Congress attaches conditions on the receipt of federal funds, an organization that does not wish to comply with the conditions may avoid them by declining to apply for and accept the funds. See, *e.g.*, *American Library Ass'n*, 539 U.S. at 212 (plurality opinion); *Rust* v. *Sullivan*, 500 U.S. 173, 199 n.5 (1991) ("[T]o avoid the force of the regulations, [the recipient] can simply decline the subsidy."); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) ("[The recipient] may terminate its participation in the [federal] program and thus avoid the

requirements.") (internal citation omitted); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 596 (1983) (opinion of White, J.) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: [the] grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt."); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981) ("[I]n return for federal funds, [recipients] agree to comply with federally imposed conditions.").

2. Congress's discretion to impose conditions on the receipt of federal funds is not without limits. Congress may not place a condition on federal funds that restricts claimants' expression if the condition would "have the effect of coercing the claimants to refrain from the proscribed speech." *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958); cf. *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006) (*FAIR*) ("This case does not require us to determine when a condition placed on university funding goes beyond [a] 'reasonable' choice * * * and becomes an unconstitutional condition."). The court of appeals concluded that Section 7631(f) transgresses that limitation because it compels recipients to adopt the government's position on prostitution and sex trafficking. See Pet. App. 18a-19a, 25a.

That rationale is fundamentally mistaken. In the funding context, as explained below in Part B, this Court has repeatedly held that the government may disburse public funds to private entities to advance a governmental program or convey a governmental message. When it does so, the government may take appropriate steps to ensure that its program is not undermined and its message is not distorted by private partners. Those private entities then face a voluntary choice: whether to

accept federal funds subject to the condition or to decline federal assistance. That choice simply does not present any risk of the kind of coercion that the Court identified in *Speiser*, *supra*. Here, respondents could choose whether to participate in the comprehensive HIV/AIDS strategy established by Congress that, among other things, aims to reduce behavioral risks like prostitution and sex trafficking that facilitate the disease's spread. This Court has consistently made clear that offering private entities that type of reasonable choice does not violate the First Amendment.

B. Section 7631(f) Ensures That The Leadership Act's Policy Opposing Prostitution And Sex Trafficking Is Effectively Implemented By Funding Recipients

1. The policy condition is an appropriate step to ensure that the Act's policy opposing prostitution and sex trafficking is not distorted by recipients

a. In enacting the Leadership Act, Congress recognized that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23); see p. 5, *supra*. Congress noted, for instance, the alarming rate of HIV infection among prostitutes in Cambodia and also the high rate of increase of infection generally in that country. See 22 U.S.C. 7601(23). Congress therefore concluded that its comprehensive strategy to address HIV/AIDS should include measures to reduce prostitution and sex trafficking in countries where the federally funded programs at issue are provided. See *ibid.* (finding that because prostitution, sex trafficking, and sexual violence contribute to the spread of HIV/AIDS and degrade women and children, "it should be the policy of

the United States to eradicate such practices"). Accordingly, the Act directs the President to make "the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts." 22 U.S.C. 7611(a)(12) (Supp. V 2011).

The government is entitled to take measures to ensure that private organizations receiving federal funds to perform services under the Leadership Act adhere to its goal of eradicating prostitution and sex trafficking. As the District of Columbia Circuit has explained, the government may "use criteria to ensure that its message [in the Act] is conveyed in an efficient and effective fashion." *DKT Int'l, Inc.* v. *USAID*, 477 F.3d 758, 762 (2007) (*DKT*). Congress judged that it would make little sense for the government to provide billions of dollars for the treatment and prevention of HIV/AIDS, including for the reduction of prostitution and sex trafficking, and yet to engage as partners in that effort organizations that assume a posture of indifference toward or that even affirmatively oppose efforts to eliminate those practices. See *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 670 (1989) (noting the government's "compelling interest" in preventing its efforts from being undermined by employees' "indifference to [their agency's] basic mission" or "active complicity" against it).

Congress determined that the effectiveness of the government's program and message would be substantially undermined if the same organizations hired to further the program's goals and to communicate that message as called for in their provision of HIV/AIDS programs and services, could at the same time advance an opposite position simply by drawing on private funds. Indeed, the overall thrust of the Leadership Act is to ensure that the United States, in cooperation with foreign governments and many different types of nongov-

ernmental organizations, develops a unified strategy to attack the HIV/AIDS pandemic. See, *e.g.*, 22 U.S.C. 7601(18), (19), (21) and (22), 7621; 22 U.S.C. 7611(a) (Supp. V 2011). Congress therefore reasonably decided that recipients should be required to make a commitment to the government that they will further central objectives of the very program under which they seek and accept federal funds. For those reasons, Congress included in the Leadership Act not only the unchallenged prohibition against the use of program funds "to promote or advocate the legalization or practice of prostitution or sex trafficking," 22 U.S.C. 7631(e), but also the complementary limitation that no funds made available under the Act "may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking," 22 U.S.C. 7631(f).

b. This Court has recognized that although the government may act or speak through its own representatives, officers, or employees, it may also enlist the assistance of private entities or organizations to carry out governmental programs and convey its chosen message. See, *e.g.*, *Rust*, 500 U.S. at 193. When the government's program entails communication, and the government "is the speaker or * * * it enlists private entities to convey its own message," the government may "regulate the content of what is or is not expressed." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995); see *ibid.* ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."). For that reason, "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its

message is neither garbled nor distorted by the grantee." *Ibid.*; see *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances * * * in which the government use[s] private speakers to transmit specific information pertaining to its own program.") (internal quotation marks and citation omitted).

Here, Section 7631(f), as implemented through the HHS regulations and USAID guidance, requires the funding recipient to agree in the award document that it opposes prostitution and sex trafficking. That representation serves to secure a commitment by the recipient that it will adhere to the government's policy of reducing and eliminating those practices—in its conduct and, as necessary, in its expression. The recipient's stated policy of opposing prostitution and sex trafficking also serves to secure a commitment that it will not undermine the government's policy goals by acting inconsistently with those goals. At the same time, Section 7631(f) does not in itself require a recipient to affirmatively volunteer to others, such as individual beneficiaries of services, an opposition to prostitution and sex trafficking. Thus, in both the purposes that it serves and the manner in which it functions, Section 7631(f) is not materially different from a condition that a recipient of federal funds agree with some other governmental policy associated with a funding program—*e.g.*, a policy opposing racial discrimination.

In light of Congress's findings, Section 7631(f)'s funding condition is plainly a "legitimate and appropriate" means to ensure that the government's goals are advanced and its message communicated as appropriate wherever the Act's funds are spent. *Rosenberger*, 515 U.S. at 833. Congress reasonably could view the se-

curing of an advance commitment from recipients as especially necessary in light of the challenges associated with monitoring the way in which private organizations provide HIV/AIDS programs and services throughout the world. Policies opposing prostitution and sex trafficking help to guarantee that the organizations receiving Leadership Act funds carry out their overseas operations in a manner that does not frustrate or undermine Congress's goals. And because the Leadership Act addresses "matters with foreign policy implications," deference to Congress's choice of means is all the more warranted. *DKT*, 477 F.3d at 762; cf. *DKT Mem'l Fund Ltd.* v. *Agency for Int'l Dev.*, 887 F.2d 275, 291 (D.C. Cir. 1989) ("[A] nation speaks in foreign affairs not only by the express messages that it sends, but by its choice of foreign entities with whom it will associate.").

c. In contrast to the decision below, the District of Columbia Circuit correctly applied this Court's precedents in its decision in *DKT*. That case also involved a First Amendment challenge to Section 7631(f) brought by a private organization, DKT International, Inc., that provided HIV/AIDS prevention programming in foreign countries in part with Leadership Act funds. See 477 F.3d at 760-761. DKT refused to adopt a policy opposing prostitution because, in its view, "this might result in stigmatizing and alienating many of the people most vulnerable to HIV/AIDS—the sex workers." *Id.* at 761 (internal quotation marks omitted). DKT argued that Section 7631(f) was unconstitutional for the same reason respondents have asserted: *i.e.*, that "it forces DKT to convey a message with which it does not necessarily agree." *Ibid.*

The District of Columbia Circuit rejected that argument. The court recognized that the government "may

hire private agents to speak for it," *DKT*, 477 F.3d at 761 (citing *Rust*, 500 U.S. at 173), and in communicating its message through private entities "the government can—and often must—discriminate on the basis of viewpoint," *ibid.* (citing *Rosenberger*, 515 U.S. at 833). The court observed that, under the Leadership Act, one central "objective is to eradicate HIV/AIDS" and "[o]ne of the means of accomplishing this objective is for the United States to speak out against legalizing prostitution in other countries." *Ibid.* As the court explained, "[t]he Act's strategy in combating HIV/AIDS is not merely to ship condoms and medicine to regions where the disease is rampant," but also to "foster[] behavioral change, *see, e.g.*, 22 U.S.C. § 7601(22)(E), and spread[] 'educational messages,' *id.* § 7611(a)(4)." *Ibid.* The court reasoned that "[s]pending money to convince people at risk of HIV/AIDS to change their behavior is necessarily a message," *ibid.*, and funding recipients reasonably can be expected not to undermine that message.

The District of Columbia Circuit thus rejected DKT's contention that the Leadership Act is simply "a program to encourage private speech." *DKT*, 477 F.3d at 762 (quoting *Rosenberger*, 515 U.S. at 833). Rather, the court held, the government is "us[ing] private speakers to transmit specific information pertaining to its own program," *ibid.* (quoting *Rosenberger*, 515 U.S. at 833), and "as in *Rust*, 'the government's own message is being delivered,' " *ibid.* (quoting *Velazquez*, 531 U.S. at 541). Because the government may "communicate a particular viewpoint through its agents and require those agents not convey contrary messages," the court reasoned, "it follows that in choosing its agents, the government may use criteria to ensure that its message is conveyed in an efficient and effective fashion." *Ibid.* "This is particu-

larly true," the court explained, "where the government is speaking on matters with foreign policy implications," as it is through the Leadership Act. *Ibid.*

The District of Columbia Circuit therefore concluded that "[t]he effectiveness of the government's viewpoint-based program would be substantially undermined, and the government's message confused, if the organizations hired to implement that program * * * could advance an opposite viewpoint in their privately-funded operations." *DKT*, 477 F.3d at 762-763 (internal quotation marks omitted). The court emphasized that Section 7631(f) "does not compel DKT to advocate the government's position on prostitution and sex trafficking; it requires only that if DKT wishes to receive funds it must communicate the message the government chooses to fund. This does not violate the First Amendment." *Id.* at 764. Precisely the same analysis is appropriate in this case.

2. Congress determined that the policy condition is an important part of the Leadership Act's comprehensive strategy

a. The court of appeals agreed that, in enacting the Leadership Act, Congress chose to adopt a comprehensive strategy to combat the global spread of HIV/AIDS. See Pet. App. 4a. The court held, however, that Section 7631(f)'s limitation of funding to organizations that have policies opposing prostitution and sex trafficking is peripheral to that strategy. See *id.* at 32a-34a. That holding is impossible to square with the legislative scheme.

As a general matter, Congress has authorized the President to furnish foreign assistance "to prevent, treat, and monitor HIV/AIDS." 22 U.S.C. 2151b-2(c)(1) (Supp. V 2011). Such aid should be "focused on women and youth, including strategies to protect women and

prevent mother-to-child transmission of the HIV infection." 22 U.S.C. 2151b-2(b) (Supp. V 2011). Among its goals, Congress wanted to help "individuals avoid behaviors that place them at risk of HIV infection," including "reducing sexual violence and coercion." 22 U.S.C. 2151b-2(d)(1)(A) (Supp. V 2011). Congress therefore directed that educational efforts concentrate on "specific populations that represent a particularly high risk of contracting or spreading HIV/AIDS, including those exploited through the sex trade" and "victims of rape and sexual assault." 22 U.S.C. 2151b-2(d)(3)(A).

In the Leadership Act specifically, Congress made "the reduction of HIV/AIDS behavioral risks a priority of *all prevention efforts*." 22 U.S.C. 7611(a)(12) (Supp. V 2011) (emphasis added). The Act directs the President to undertake various efforts to eliminate the commercial sex trade. 22 U.S.C. 7611(a)(12)(F), (H) and (J) (Supp. V 2011). In addition, Congress found as a factual matter—based in part on statistics about South Africa and Cambodia—that "[t]he sex industry, the trafficking of individuals into such industry, and sexual violence are additional causes of and factors in the spread of the HIV/AIDS epidemic." 22 U.S.C. 7601(23). Congress accordingly decreed that, under the Leadership Act, "it should be the policy of the United States to eradicate such practices." *Ibid.* Simply put, Congress made a considered decision to oppose prostitution and sex trafficking and to pursue their reduction, particularly in developing countries where most of the federally funded programs at issue are provided.

The two limitations Congress imposed on the use of Leadership Act funds work together to further its objectives. Section 7631(e)—which respondents do not challenge—bars the use of funds under the Act "to promote

or advocate the legalization or practice of prostitution or sex trafficking." It thereby ensures that recipients do not use Leadership Act funds to promote prostitution or sex trafficking. The grant of federal funds, however, could free nonfederal monies to be used to promote prostitution or sex trafficking. Cf. *Holder* v. *Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010). The requirement in Section 7631(f) that recipients have a policy opposing prostitution and sex trafficking prevents the organization (or its employees) from promoting, advocating, or affirmatively condoning prostitution or sex trafficking. It thereby prevents recipients from undermining the very program they receive federal funds to advance.

Even if recipients did not promote prostitution or sex trafficking with nonfederal funds, Section 7631(f) keeps them from ignoring Congress's objectives or acting with indifference toward them. Section 7631(f)'s policy requirement serves to ensure that funding recipients adhere to Act's policy opposing prostitution and sex trafficking in the foreign countries where they operate. To be sure, Section 7631(f) only requires recipients to have such a policy; it does not further require them to actively disseminate that policy to foreign nationals. Indeed, only some recipients will actively convey that message by implementing federally funded projects aimed at reducing the commercial sex trade. But Congress saw a value in having all recipients, whatever their particular focus, have a policy opposing prostitution and sex trafficking. Respondents do not dispute (Br. in Opp. 5-6 & n.4) that they represent most of the groups based in the United States that receive the HIV/AIDS funding at issue. Congress reasonably believed that if all those groups adopt policies opposing the sex trade and traf-

ficking, they will together advance that goal with consistency, force, and scope.

Respondents thus err in relying on the premise that "the Leadership Act was designed to combat HIV/AIDS through a broad and comprehensive set of actions—not words." Br. in Opp. 28-29. The Leadership Act seeks to combat HIV/AIDS through both actions *and* words, and Section 7631(f) helps establish and convey the policy perspective on prostitution and sex trafficking in federally funded HIV/AIDS relief efforts. Under the Act, recipients are free to decline to participate in that strategy, but the First Amendment does not entitle them to elect participation in the program, accept program funding, and then disregard an important goal of the program. See *Guardians Ass'n*, 463 U.S. at 596 (opinion of White, J.) ("[T]he receipt of federal funds under typical Spending Clause legislation is a consensual matter: [the] grantee weighs the benefits and burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt.").

b. Relatedly, respondents assert that Section 7631(f) is a "marginal provision" that is not "integral to the Leadership Act's goals." Br. in Opp. 29, 31 (internal quotation marks omitted). The court of appeals believed the same thing and rejected the government's contention "that advocating against prostitution [and sex trafficking] is indeed 'central' to the Leadership Act Program." Pet. App. 33a. The court acknowledged that in some circumstances the government may require "affirmative, viewpoint-specific speech as a condition of participating in a federal program." *Id.* at 32a; see *ibid.* ("[I]f the government were to fund a campaign urging children to 'Just Say No' to drugs, we do not doubt that it could require grantees to state that they oppose drug

use by children."). But that is so, the court reasoned, when "the government's program *is*, in effect, its message." *Ibid.* In the court's view, that is not the case here because "[t]he stated purpose of the Leadership Act is to fight HIV/AIDS" rather than to fight prostitution and sex trafficking. *Ibid.* (emphasis omitted).

That approach cannot be correct. In cases involving restrictions challenged on First Amendment grounds, it would require courts to make their own case-by-case judgments about whether Congress's chosen policy and the related condition are "central" or merely "subsidiary" to a given funding program. Pet. App. 33a (internal quotation marks omitted). But it is for *Congress*—not respondents or the lower courts—to decide when a condition on the receipt of federal funds is integral to the funding program at issue. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 n.11 (1977) ("Legislation is frequently multipurposed: the removal of even a 'subordinate' purpose may shift altogether the consensus of legislative judgment supporting the statute.") (quoting *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973)); *McGinnis*, 410 U.S. at 276 ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate.").

Even taking the court of appeals' test on its own terms, the court erred in dismissing Section 7631(f) as peripheral to the Leadership Act. Pet. App. 32a-34a. As explained above, Congress did not want to address only the effects of HIV/AIDS; it also wanted to address the factors that place certain groups at higher risk of contracting HIV/AIDS. See pp. 3-5, 19-20, *supra*. Congress determined when it enacted the Act that reducing and eradicating prostitution and sex trafficking are of

great importance in preventing the spread of HIV/AIDS. See, *e.g.*, 22 U.S.C. 7601(23). In Congress's view, there are different ways "to fight HIV/AIDS," Pet. App. 32a (emphasis omitted), one of which is to oppose and work to eliminate certain activities that help to spread the disease. In that critical respect, "the government's program *is*, in effect, its message." *Ibid.*

c. The court of appeals viewed the exemptions for certain entities in Section 7631(f) as justifying its conclusion that affirmatively opposing prostitution is not central to the Leadership Act. See Pet. App. 33a-34a; 22 U.S.C. 7631(f) ("[T]his subsection shall not apply to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency."). That was incorrect. As a threshold matter, "the relevance of a statute's underinclusiveness is that it may reveal discrimination on the basis of viewpoint or content, or may undercut the statute's purported nondiscriminatory purpose." *Ruggiero* v. *FCC*, 317 F.3d 239, 250 (D.C. Cir.), cert. denied, 540 U.S. 813 (2003). Here, "[b]ecause viewpoint discrimination raises no First Amendment concerns when the government is speaking, the underinclusiveness of the certification requirement is immaterial." *DKT*, 477 F.3d at 763 n.5; see *Regan* v. *Taxation with Representation*, 461 U.S. 540, 547-548 (1983) (upholding lobbying restrictions that applied to nonprofit organizations but exempted veterans' organizations).

More basically, however, the exempt entities are not similarly situated to the organizations subject to Section 7631(f). One of the exempt entities, the International AIDS Vaccine Initiative (IAVI), is a nongovernmental organization that focuses on developing a vaccine for

HIV/AIDS. See Pet. App. 91a; 22 U.S.C. 2222(*l*) (Supp. V 2011). Congress reasonably could conclude that there is little risk IAVI would undermine the Leadership Act's opposition to prostitution and sex trafficking. The remaining exempt entities—the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; and United Nations agencies—are international bodies whose membership is composed primarily or exclusively of sovereign states. See Pet. App. 91a-92a. Congress appropriately could decide not to attempt unilaterally to require those organizations to adopt policies opposing prostitution or sex trafficking. The United States' relationship with entities composed or governed by other sovereign states is very different from its relationship with private nongovernmental organizations. Congress reasonably could determine that other sovereign states should be left to pursue their own policy objectives. And the international character and composition of the exempt bodies makes it quite unlikely that their views or actions would be specially attributed to the United States (particularly in light of Congress's clear statement of policy in the Leadership Act itself).

3. Respondents argue that Section 7631(f) cannot be intended to ensure that recipients work toward the government's goals and communicate the government's message, because it "compel[s] private speakers to adopt and espouse *as their own* the government's message." Br. in Opp. 26. Respondents are mistaken. The Court's cases in this area rest on the assumption that when the government "enlists private entities to convey its own message," *Rosenberger*, 515 U.S. at 833, the private speakers are not entitled to transmit the message in a way that distances themselves from it or even indicates their own lack of agreement with it. For instance,

if the government funds a campaign opposing drug use by children, it may require the advertisements to declare "Just Say No To Drugs," rather than "The United States Government Wants You To Just Say No To Drugs." A governmental funding program may enlist private entities to speak in the same way that the government speaks—or in the same way that the government would speak if it undertook itself "to transmit specific information pertaining to its own program." *Ibid.*

Here, Congress has expressed its purpose "to eradicate" prostitution and sex trafficking, 22 U.S.C. 7601(23), and it wants recipients to adopt a similar stance opposing those practices so that they will be reliable partners and emissaries. Section 7631(f)'s funding condition that recipients have a policy opposing prostitution and sex trafficking ensures that recipients act as faithful agents in that regard in spending federal funds. Even the court of appeals accepted the legitimacy of those governmental interests. As the court correctly recognized, "if the government were to fund a campaign urging children to 'Just Say No' to drugs, * * * it could require grantees to state that they oppose drug use by children." Pet. App. 32a. That would remain true even if only some recipients conducted the advertising campaign and other recipients performed different but related projects, because they all would be part of a comprehensive federal strategy aimed at decreasing juvenile drug use.

To take an analogous example, suppose that in the 1980s Congress had authorized foreign assistance to address racial violence in South Africa. Suppose further that, based on its belief that apartheid was a cause of such violence, Congress had adopted a policy calling for the eradication of apartheid and made funding under the

program available only to private organizations that adopted a policy opposing apartheid. On respondents' view, such legislation would be unconstitutional because it would require organizations that elect to participate in the program to adopt and communicate the government's policy perspective. Of course, that is the very point of the funding under the hypothetical program in the first place: Congress wants the private partners in its foreign program to stand against racial segregation, both to influence conditions in that foreign country and to ensure that recipients comport with Congress's determination that racial segregation should be eliminated as a means of addressing racial violence. As in the present case, private organizations with a different view of apartheid would be free to decline federal funding, but the First Amendment would not confer on them a right to accept federal funding and yet refuse to commit to one of the program's central objectives.

C. Section 7631(f) Is Not Unconstitutional On The Rationale That It Compels Recipients To Speak With Respect To Prostitution And Sex Trafficking

1. The court of appeals reasoned that the Act's funding condition is impermissible because it affirmatively compels speech by the recipients of the Act's funds. See Pet. App. 25a. This Court has never held, however, that it matters whether conditions on the receipt of federal funding compel speech or silence. Indeed, the Court has held that the distinction ordinarily is without constitutional significance even in the context of the direct regulation of speech. See *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional signifi-

cance."). There is no reason, then, that such a distinction should be determinative in the context of funding conditions, where recipients may avoid the conditions altogether simply by declining to accept the federal funds at issue. See, *e.g.*, *Rust*, 500 U.S. at 199 n.5 ("[T]o avoid the force of the regulations, [the recipient] can simply decline the subsidy.").

The reasoning of this Court's decisions on funding conditions likewise lends no support to the court of appeals' reliance on a strict affirmative-negative dichotomy. In *Rust*, for instance, the Court upheld against a First Amendment challenge restrictions that barred federally funded family-planning programs from providing abortion counseling or encouraging abortion as a method of family planning. See 500 U.S. at 179-181, 192-193. The Court recognized that "[t]he [g]overnment can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest." *Id.* at 193. Similarly, in *Regan*, this Court upheld a restriction on lobbying by nonprofit organizations that were allowed to receive tax-deductible contributions. See 461 U.S. at 550. The Court held that Congress did not violate the First Amendment by choosing "not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare." *Id.* at 544.

Those cases do not suggest that the constitutionality of a federal funding condition under the First Amendment turns on whether the recipient must (i) adopt a policy or convey a message that the government program is intended to promote or (ii) refrain from adopting a policy or conveying a message that is contrary to the funding program. In either situation, what matters

is that the government has elected to selectively fund a program—in which participation is entirely voluntary—aimed at encouraging or discouraging certain activities of substantial public interest: abortion counseling in *Rust*, certain types of lobbying in *Regan*, and foreign prostitution and sex trafficking in this case. See Pet. App. 99a (Cabranes, J., dissenting from the denial of reh'g en banc) ("The decision of the panel majority * * * is based on a newly uncovered constitutional distinction between 'affirmative' and 'negative' speech restrictions."); *id.* at 103a (Cabranes, J., dissenting from the denial of reh'g en banc) ("[I]t is clear that the disposition of this case turns not on the existing jurisprudential framework, but on an affirmative-negative paradigm of the panel's own invention.").

2. Respondents contend, and the court of appeals agreed, that "affirmative compulsion of speech [is] more troubling than an affirmative compulsion of silence." Br. in Opp. 20; see Pet. App. 25a-26a & n.3. But neither the court of appeals nor respondents have addressed the Court's rejection of that affirmative-negative distinction in *Riley*, nor have they offered any reason why the distinction should be dispositive here. Respondents cite (Br. in Opp. 20) *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), but in those cases this Court simply held that citizens could not be compelled to speak when they wished to remain silent. The Court did not hold that silencing those who wish to speak is a less serious matter under the First Amendment. Indeed, the Court recognized that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley*, 430 U.S. at 714.

The court of appeals observed that none of this Court's previous cases considered "an affirmative speech restriction." Pet. App. 26a n.3; see Br. in Opp. 20-21. Although this Court's decisions on funding conditions did not arise on identical facts, the logic of those decisions is inescapable. As the Court has recognized, Congress may "selectively fund a program to encourage certain activities it believes to be in the public interest," *Rust*, 500 U.S. at 193, and it may do so by "us[ing] private speakers to transmit specific information pertaining to its own program," *Rosenberger*, 515 U.S. at 833. When Congress enlists private speakers in that way, there is no reason why it must "transmit [its] information" only indirectly or passively, by requiring private entities to refrain from speech on certain subjects but not by requiring the same entities to actually embrace the government's message. Such a distinction would make little sense and would undercut Congress's ability to "enlist[] private entities to convey its own message." *Ibid.* Indeed, in many cases, Congress might be able to frame the funding condition as either an "affirmative" or a "negative" limitation: recipients could be required to *promote* certain activities but not others, or they could be required to *oppose* certain activities but not others. Either way, Congress's characterization bears on questions of legislative policy, not constitutional doctrine.

D. Section 7631(f) Does Not Aim At The Suppression Of Disfavored Viewpoints

1. Congress's authority under the Spending Clause is not without First Amendment limits. This Court has indicated that a funding condition is subject to heightened scrutiny when it is aimed at suppressing "dangerous ideas," *Speiser*, 357 U.S. at 519 (quoting *American*

Commc'ns Ass'n v. *Douds*, 339 U.S. 382, 402 (1950)), or "disfavored viewpoints," *Finley*, 524 U.S. at 587. It would therefore raise a different set of constitutional issues if Congress's conditions on Leadership Act funding were "calculated to drive 'certain ideas or viewpoints from the marketplace.' " *Ibid.* (quoting *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)); cf. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (suggesting that a subsidy scheme may not be "manipulated" in order to have a "significant coercive effect").

In this case, however, respondents have not argued, and the court of appeals did not conclude, that Section 7631(f)'s funding condition is aimed at suppressing expression concerning prostitution and sex trafficking by private HIV/AIDS relief organizations. As Judge Straub explained in dissent, "[t]here is simply no evidence that Congress's purpose in enacting the Leadership Act and attaching the Policy Requirement was to suppress pro-prostitution views," and "[t]he Policy Requirement and Guidelines therefore in no way silence government criticism or contrary views on prostitution and HIV/AIDS." Pet. App. 83a-84a. Private HIV/AIDS relief organizations (like anyone else) remain free to advocate for, or be neutral toward, prostitution and sex trafficking. Congress has simply made the reasonable judgment that if organizations awarded federal funds to implement Leadership Act programs could at the same time promote or affirmatively condone prostitution or sex trafficking, whether using public or private funds, it would undermine the government's program and confuse its message opposing prostitution and sex trafficking.

2. Respondents rely (Br. in Opp. 19, 25-26) on two cases—*Velazquez*, *supra*, and *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984)—in which this Court invalidated federal funding conditions under the First Amendment. Those cases are inapposite. In both cases, the government was funding and facilitating private speech rather than promoting its own program and message through private speakers. See *Velazquez*, 531 U.S. at 542, 548; *League of Women Voters*, 468 U.S. at 378-380, 386-387, 395; see also *Rosenberger*, 515 U.S. at 834. And in both cases, the Court determined that Congress's funding conditions attempted "[to] suppress speech inherent in the nature of the medium." *Velazquez*, 531 U.S. at 543; see *id.* at 544-545 (restricting lawyers from advancing certain arguments as a condition of funding "distorts the legal system" and "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"); *League of Women Voters*, 468 U.S. at 396-397. Here, respondents have not argued that the ability to advocate for, or remain neutral toward, prostitution and sex trafficking is "inherent" in providing HIV/AIDS-related programs and services in foreign countries.

Moreover, in both *Velazquez* and *League of Women Voters*, this Court relied on the absence of any alternative channel for the restricted expression. See *Velazquez*, 531 U.S. at 546-547 ("[T]here is no alternative channel for expression of the advocacy Congress seeks to restrict. This is in stark contrast to *Rust*."); *League of Women Voters*, 468 U.S. at 400 (observing that the statute would "plainly be valid" if stations were allowed "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds"). As explained below, HHS and USAID have es-

tablished affiliation guidelines (similar to the program-integrity requirements upheld by this Court in *Rust*) that allow Leadership Act funding recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). See pp. 44-45, *infra*. The agencies' guidelines alleviate any burden that might otherwise exist on the ability to communicate contrary views on prostitution and sex trafficking.

3. Even in the cases in which this Court has invalidated a condition on something other than direct federal funding, it has done so because the condition aimed to suppress the expression of a certain set of ideas. See, *e.g.*, *Speiser*, 357 U.S. at 529 (invalidating on due process grounds a state law that conditioned a veterans' tax exemption on swearing an oath not to advocate the overthrow of the federal or state government); *id.* at 519 ("The denial [of the tax exemption] is frankly aimed at the suppression of dangerous ideas.") (internal quotation marks omitted); cf. *Perry* v. *Sindermann*, 408 U.S. 593, 598 (1972) (holding that a state college's refusal to renew an employment contract would violate the First Amendment if it were based on the employee's criticism of his superiors on matters of public concern). But at least as a general matter a federal funding program is designed to enlist recipients in advancing the government's own policy objectives, see *Finley*, 524 U.S. at 587-588, and here respondents have not attempted to demonstrate that Section 7631(f) is designed to suppress private speech supporting prostitution and sex trafficking.

E. Section 7631(f) Is Not A Direct Speech Regulation But A Condition On The Receipt Of Federal Funds

For the most part, respondents treat Section 7631(f) as if it were a direct regulation of speech rather than as a condition on the receipt of federal funds. Respondents repeatedly rely (Br. in Opp. 18-21) on this Court's cases analyzing direct regulations that compel speech or discriminate on the basis of viewpoint, without any acknowledgment that the government "may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Finley*, 524 U.S. at 587-588. That distinction between funding conditions and direct speech regulations is critical to resolving this case.

1. Respondents argue (Br. in Opp. 20-21) that Section 7631(f) compels speech in violation of the First Amendment. The court of appeals accepted that argument, relying on this Court's decisions in *Wooley*, *Speiser*, and *Barnette* addressing the compelled-speech doctrine. See Pet. App. 25a-26a. Those cases, however, did not involve Congress's spending power. Rather, "[i]n each of those cases, the penalty for refusing to propagate the message was denial of an already-existing public benefit. None involved the government's selective funding of organizations best equipped to communicate its message." *DKT*, 477 F.3d at 762 n.2. As the District of Columbia Circuit recognized, that distinction is crucial. "Offering to fund organizations who agree with the government's viewpoint and will promote the government's program is far removed from cases in which the government coerced its citizens into promoting its message on pain of losing their public education, *Barnette*, 319 U.S. at 629, or access to public roads,

Wooley, 430 U.S. at 715." *Ibid.* (parallel citations omitted).

The compelled-speech doctrine addresses circumstances in which "an individual is obliged personally to express a message he disagrees with, imposed by the government." *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005). In *Barnette*, the state law at issue required schoolchildren to recite the Pledge of Allegiance and salute the flag, see 319 U.S. at 642; and in *Wooley*, the state law required New Hampshire motorists to display the state motto, "Live Free or Die," on their license plates, see 430 U.S. at 707, 717. Conditioning the availability of federal HIV/AIDS assistance on adhering to that program's policy opposing prostitution and sex trafficking "is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *FAIR*, 547 U.S. at 62. Unlike in *Barnette* and *Wooley*, respondents have not been compelled to do anything: they must have a policy *as a result of their own choice to accept federal funds*, not as a result of any legal mandate.[5]

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[5] The court of appeals purported to recognize that *Barnette* and *Wooley* are "distinguishable," but it "dr[e]w from them the underlying principle that the First Amendment does not look fondly on attempts by the government to affirmatively require speech." Pet. App. 26a n.3. But what makes those cases distinguishable is that they dealt with direct compulsions of private speech, not criteria for implementing the government's own programs. The court of appeals' "underlying principle" thus does not apply to this context, because when the government "is the speaker or when it enlists private entities to convey its own message, * * * it is entitled to say what it wishes." *Rosenberger*, 515 U.S. at 833.

Respondents' real objection to Section 7631(f) rests not on First Amendment doctrine but on a policy judgment. They do not want to adopt a policy opposing prostitution because, in their view and as one of respondents acknowledged in *DKT*, "this might result in stigmatizing and alienating many of the people most vulnerable to HIV/AIDS—the sex workers." 477 F.3d at 761 (internal quotation marks omitted); see Br. in Opp. 7 (noting respondents' belief "that adopting a policy that explicitly opposes prostitution would jeopardize [r]espondents' effectiveness in working with high-risk groups to fight HIV/AIDS"). That presumably explains why respondents have not challenged the portion of Section 7631(f) that conditions funding on having a policy opposing sex trafficking: respondents do not wish to work with, and thus do not mind stigmatizing and alienating, sex traffickers.

Of course, respondents are fully entitled to believe, as a matter of policy, that they will operate more effectively or better serve Congress's goals if they are permitted to remain neutral on the practice of prostitution (or even sex trafficking). See Compl. at 7, *DKT Int'l, Inc.* v. *USAID*, 435 F. Supp. 5 (D.D.C. 2006) (No. 1:05-cv-1604), rev'd, 477 F.3d 758 (D.C. Cir. 2007) ("[A]s an organization working to prevent the spread of HIV/AIDS, [DKT] strongly believes it can best do that * * * by maintaining neutrality on * * * the HIV/AIDS epidemic and prostitution."). And there is no reason to doubt the strength of respondents' commitment to preventing the spread of HIV/AIDS or the sincerity of their belief that Congress would best achieve that objective without any condition that funding recipients have a policy opposing prostitution and sex trafficking. But the "[g]overnment can, without violating the Constitution, selectively fund

a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." *Rust*, 500 U.S. at 193; see *Finley*, 524 U.S. at 597 (Scalia, J., concurring in the judgment) (quoting *Rust*). It is Congress, not this Court, that is the appropriate forum for challenging the public health rationale for the funding condition in Section 7631(f).

2. Respondents' and the court of appeals' assertion that Section 7631(f) impermissibly discriminates on the basis of viewpoint likewise ignores the distinction between funding conditions and direct speech regulations. See Br. in Opp. 20-21; Pet. App. 27a-29a. Insofar as any communicative element of a federal program is concerned, when the government "enlists private entities to convey its own message," the government may "regulate the content of what is or is not expressed." *Rosenberger*, 515 U.S. at 833; see *DKT*, 477 F.3d at 761 ("When it communicates its message, * * * the government can—and often must—discriminate on the basis of viewpoint."). Respondents and the court of appeals thus once again miss the point by relying (Br. in Opp. 19, 21; Pet. App. 27a) on cases involving direct, content-based regulations of speech rather than federal funding programs. See, *e.g.*, *Simon & Schuster, Inc.*, 502 U.S. at 115-117, 123 (invalidating a New York state law that imposed content-based financial burdens on certain speech by accused or convicted criminals).[6]

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[6] Respondents also are mistaken in their characterization of Section 7631(f). Respondents' employees are not required by Section 7631(f) to affirmatively express an opinion about prostitution and sex trafficking when they come into contact with members of high-risk groups. Rather, as explained below, funding recipients communicate

F. The Agencies' Affiliation Guidelines Obviate Any Constitutional Difficulty

1. a. To the extent that Section 7631(f) poses any constitutional difficulty, the agencies' affiliation guidelines dispel it. As an initial matter, recipients comply with the statutory requirement simply by accepting federal funds. Under the agencies' guidelines, HHS and USAID include the policy provision "in the award documents for any grant, cooperative agreement, or other funding instrument." 45 C.F.R. 89.1(b); see Pet. App. 297a, 302a-303a, 308a. By signing award documents and accepting federal funds pursuant to those agreements, recipients thereby "agree that they are opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children." 45 C.F.R. 89.1(b); see Pet. App. 297a, 302a-303a, 308a. Recipients are not required to take additional, affirmative measures to certify their compliance with the statutory condition or to publicize their policy to third parties.

b. The agencies' guidelines also allow recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). Those guidelines permit an organization to remain eligible for funding and yet be affiliated with a group that "engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," so long as the organization that receives funding has "objective integrity and independence from [any affiliated] organization." 45 C.F.R. 89.3; see Pet. App. 297a, 309a. Whether a recipient is inde-

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opposition to prostitution and sex trafficking *to HHS and USAID* through the funding agreement, which is directed to securing the organization's commitment to the program's goals.

pendent from affiliated organizations depends on the totality of the circumstances, including such factors as whether the groups are legally distinct and maintain separate personnel, records, facilities, and forms of identification. See 45 C.F.R. 89.3(b); Pet. App. 298a, 309a-310a. Those affiliation guidelines are modeled on the program-integrity standards that were upheld by the court of appeals in *Velazquez*, see *Velazquez* v. *Legal Servs. Corp.*, 164 F.3d 757, 761-762 (2d Cir. 1999), cert. denied in relevant part, 532 U.S. 903 (2001), which in turn were modeled on the similar requirements upheld by this Court in *Rust*.

2. The court of appeals rejected the government's argument that, "because any entity unwilling to state its opposition to prostitution can form an affiliate that does so," "any compelled-speech type problems" are alleviated by the HHS and USAID guidelines. Pet. App. 35a. "It may very well be that the Guidelines afford [respondents] an adequate outlet for expressing their opinions on prostitution," the court stated, "but there remains, on top of that, the additional, affirmative requirement that the recipient entity pledge its opposition to prostitution." *Id.* at 36a.

That reasoning is not consistent with this Court's decisions addressing similar affiliation guidelines. For instance, the restriction at issue in *Regan* prevented nonprofit organizations from lobbying with tax-deductible contributions, but a related provision permitted those organizations to form affiliates that could engage in lobbying activities. See 461 U.S. at 544. The Court noted that "dual structure" in upholding the restriction, *ibid.*, observing that an affected organization had not been denied "any independent benefit on account of its intention to lobby," *id.* at 545. See *id.* at 553 (Blackmun, J.,

concurring) (reasoning that the lobbying restriction was permissible because of the affiliate provision); see also *Rust*, 500 U.S. at 198 ("Congress has merely refused to fund [abortion-related] activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the [federal] project in order to ensure the integrity of the federally funded program."). To the same effect, in *League of Women Voters*, *supra*, in which the Court invalidated a federal law that prohibited editorializing by federally funded television and radio stations, the Court noted that if Congress had permitted stations to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." 468 U.S. at 400.

In light of *Regan*, *League of Women Voters*, and *Rust*, other circuits have found that affiliation guidelines obviate any constitutional difficulty, because they allow funding recipients to cabin the effects of their undertakings to the scope of the federally funded program at issue. See, *e.g.*, *DKT*, 477 F.3d at 763 ("Nothing prevents DKT from itself remaining neutral and setting up a subsidiary organization that certifies it has a policy opposing prostitution."); *Planned Parenthood of Mid-Mo. & E. Kan., Inc.* v. *Dempsey*, 167 F.3d 458, 463-464 (8th Cir. 1999) (upholding a Missouri statute that "require[d] abortion services to be provided through independent affiliates"); *Legal Aid Soc'y* v. *Legal Servs. Corp.*, 145 F.3d 1017, 1026 (9th Cir.) (upholding, as "consistent with the decisions in *Regan* and *League of Women Voters*," regulations "requir[ing] that if a recipient wishes to engage in prohibited activities, it must establish an organization separate from the recipient in order to ensure that federal funds are not spent on prohibited activ-

ities"), cert. denied, 525 U.S. 1015 (1998). As other courts of appeals have recognized, affiliation guidelines like those promulgated by HHS and USAID reinforce the validity of funding conditions like the one at issue here.

The court of appeals reasoned that the HHS and USAID affiliation guidelines do not adequately address respondents' constitutional challenge because organizations electing to accept funds must convey a particular message rather than refrain from speaking. Pet. App. 35a-36a. That reasoning misunderstands the First Amendment value of affiliate structures. Regardless of whether a funding condition requires the recipient to speak or remain silent, the relevant question is whether the condition "effectively prohibit[s] the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197. Here, the affiliation guidelines—which are modeled on the program integrity requirements upheld in *Rust* but which have been made more flexible to account for the challenges of operating overseas, see p. 51, *infra*—allow a recipient to cabin the effects of Section 7631(f)'s funding condition to the scope of Leadership Act programs and services.

3. According to respondents, "the separation requirements [in *Rust*] were designed to maintain adequate separation among *programs* within a grantee organization, as opposed to the separation requirements here which are designed to maintain adequate separation among independent *entities or affiliates*." Br. in Opp. 23 (internal citation omitted). The District of Columbia Circuit correctly rejected that distinction in *DKT*. See 477 F.3d at 761-762. The plaintiff-organization in *DKT* argued (as respondents do here)

that *Rust* "involved funding restrictions only on *projects*, not on *grantees*." *Id.* at 763. The court reasoned, however, that just as a clinic in *Rust* could advocate abortion "through programs that [were] separate and independent from the project that receives Title X funds," *ibid.* (quoting *Rust*, 500 U.S. at 196), so too here a funding recipient could "set[] up a subsidiary organization that certifies it has a policy opposing prostitution," *ibid.* The court in *DKT* thus recognized that the constitutionality of Section 7631(f) should not depend on whether respondents have to channel federal funds into separate projects or separate affiliated entities. See *Velazquez*, 164 F.3d at 766-767 (upholding funding restrictions on grantees rather than projects).[7]

Respondents argue (Br. in Opp. 22-24) that Section 7631(f) imposes an entity-wide restriction and thus prevents an *affiliate* from spending private funds to espouse prostitution or sex trafficking. But respondents do not dispute that they can form affiliates whose sole purpose is receiving and administering federal HIV/AIDS funding. It is no answer, then, to say that even if Section 7631(f) does not infringe respondents' speech rights (in part because they may form affiliates and otherwise continue operating as they do now), it infringes their affiliates' speech rights. The point is that by allowing respondents to form special-purpose affili-

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[7] Indeed, the agencies' guidelines are more favorable to respondents than the *DKT* court foresaw. The court in *DKT* assumed that a funding recipient would have to form a separate subsidiary organization. See 477 F.3d at 763 & n.4. In April 2010, however, the agencies modified their affiliation guidelines so that legal separation between an organization and its affiliate would no longer be a blanket prerequisite but would be one factor in determining an affiliate's independence. See Pet. App. 10a-11a.

ates (and thereby cabin the effects of Section 7631(f) to the scope of the federally funded programs at issue), the agencies' guidelines appropriately confine any burden that might otherwise exist on the communication of contrary views on prostitution and sex trafficking.

G. Respondents' Vagueness Challenge Is Not Presented And Lacks Merit In Any Event

1. Respondents contend (Br. in Opp. 33) that the policy condition is unconstitutionally vague. Neither of the courts below addressed respondents' vagueness challenge, see Pet. App. 36a n.8, 214a-215a, 250a, and respondents do not point to any other court that has done so. This Court "is one of final review, 'not of first view,' " and there is no reason for the Court "to abandon [its] usual procedures in a rush to judgment without a lower court opinion." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). In the event that the Court reverses the judgment below, respondents may pursue their vagueness challenge on remand.

2. In any event, respondents do not even claim before this Court that the statute itself is vague. Section 7631(f) requires respondents to "have a policy explicitly opposing prostitution and sex trafficking," and they have not pointed to any lack of clarity in that requirement. Numerous federal statutes require the adoption of a policy addressing a particular issue. See, *e.g.*, 12 U.S.C. 1831r-1(c) (requiring insured depository institutions to "adopt policies for closings of branches"); 20 U.S.C. 1232h(c)(1) (requiring federally funded local educational agencies to "develop and adopt policies, in consultation with parents," on particular issues); 42 U.S.C. 5304(*l*)(1) and (2) (providing that federal funds

may not be given to local governmental units that "fail[] to adopt and enforce" particular civil rights policies).

Faced with that clear statutory requirement, respondents argue (Br. in Opp. 9, 33) instead that the agencies' *affiliation guidelines* are unconstitutionally vague. As explained above, those guidelines allow funding recipients to establish and work with separate affiliates that are not funded under the Act and thus are not subject to Section 7631(f). "A recipient," however, "must have objective integrity and independence from any affiliated organization that engages in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking." 45 C.F.R. 89.3; see Pet. App. 297a, 309a. According to respondents (Br. in Opp. 33), that regulation is vague because it does not define when an affiliated organization is engaged in an activity "inconsistent" with opposition to prostitution and sex trafficking. But whatever the merits of that argument, the district court enjoined enforcement of the *statute*, see Pet. App. 252a (enjoining petitioners "from enforcing the requirement § 7631(f)" of the Leadership Act), and the court of appeals affirmed that injunction, see *id.* at 37a. On remand, respondents may pursue their challenge to the affiliation guidelines, but that challenge provides no basis for the lower courts' invalidation of the statute.

3. In any event, respondents' argument lacks merit. The test for whether the affiliation guidelines provide sufficient clarity is a very permissive one in the context of a governmental funding program: "[W]hen the [g]overnment is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." *Finley*, 524 U.S. at 589. Respondents' burden is even heavier than that, however, because they

have brought a preenforcement facial challenge to the guidelines—and they have done so despite the agencies' expressed willingness to provide preenforcement advice. As HHS explained in the preamble to its regulation, "[g]iven the numerous factual situations that may arise, the Department has deliberately adopted a case-by-case approach in this area, recognizing that circumstances in some countries may make it difficult for organizations to satisfy some of the factors demonstrating objective integrity and independence. The Department also plans to work with recipients to address individual questions regarding the separation criteria, and to help remedy violations before taking enforcement action." 75 Fed. Reg. 18,762 (Apr. 13, 2010). Similarly, recipients may direct questions to USAID, see Pet. App. 311a, which is willing to work with them to address application of the separation criteria. By virtue of this suit, however, HHS and USAID have been enjoined from enforcing the statute against domestic funding recipients—and thus applying their affiliation guidelines and providing preenforcement advice to those organizations—for the last six years. Respondents therefore must show that the guidelines are so unclear that HHS and USAID should never have the chance to explain, apply, and then enforce them.

Respondents cannot make that showing. At the least, an affiliated organization is "engage[d] in activities inconsistent with the recipient's opposition to the practices of prostitution and sex trafficking," 45 C.F.R. 89.3, if the affiliated organization "promote[s] or advocate[s] the legalization or practice of prostitution or sex trafficking," 22 U.S.C. 7631(e). That is the limitation on the use of federal funds in Section 7631(e) of the Leadership Act—a limitation that respondents do not challenge on

vagueness grounds. In other words, respondents concede that it is clear what they may not do with federal funds, *i.e.*, promote or advocate the legalization or practice of prostitution or sex trafficking. At a minimum, the guidelines incorporate that same standard. If an organization engages in such promotion or advocacy (with or without federal funds), then it is "engage[d] in activities inconsistent with * * * opposition to the practices of prostitution and sex trafficking" and the organization must maintain its independence from any recipient. Whether the guidelines extend beyond the limitation on the use of federal funds in Section 7631(e) may be addressed as applied to particular situations in consultation with the agencies.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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